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No. 80-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY *Petitioner,*

v.

WILLIAM DAVID HENSLEY *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the divided court below was correct in reweighing the evidence and reversing an Administrative Law Judge's findings of fact on a disputed medical issue in a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, when (1) the "substantial evidence" rule limits judicial review of such findings to a determination only as to whether such findings were supported by substantial evidence; (2) the factual determination under review was made following a full evidentiary hearing during which three differing medical opinions from properly qualified experts were received in evidence without objection, and was made after the factfinder assessed the witnesses' demeanor and analyzed the experts' reasoning underlying their opinions; and (3) the widespread rule of American jurisprudence is that an expert opinion is not binding upon the finder of fact, but where it has been accepted as basis for decision, it constitutes "substantial evidence" for purposes of judicial review.

PARTIES BELOW

In the Court below, Petitioner Washington Metropolitan Transit Authority appeared as Respondent, and William D. Hensley, Respondent herein, appeared as Petitioner. The Director, Office of Workers' Compensation, U.S. Department of Labor, did not appear in the Court below.

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No. _____

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v.

WILLIAM DAVID HENSLEY *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Washington Metropolitan Area Transit Authority (hereinafter "Metro") prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on March 17, 1981 (Appendix A).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A) has not yet been reported in the offical reports, but has been

reported at 13 BRBS 182. The Decision of the Benefits Review Board of the Department of Labor (Appendix B) is reported at 11 BRBS 468. The Opinion and Order of the Administrative Law Judge of the Office of Workers Compensation Programs (Appendix C) is not yet reported.

JURISDICTION

The judgement of the Circuit Court of Appeals was entered on March 17, 1981. No petition for re-hearing was filed in that Court. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901, *et seq.* is made applicable to the District of Columbia pursuant to the provisions of the District of Columbia Code §36-501, *et seq.* The applicable statutory provisions, including those of the Administrative Procedure Act, 5 U.S.C. §500, *et seq*, together with the relevant regulations involved in this case are fully set forth in the Statutory Appendix, at pp. 1a-6a.

STATEMENT OF THE CASE

William D. Hensley, a 55-year old bus driver for Metro, had suffered for many years with psoriasis, a skin condition. Following a worsening of this condition, he ceased working in August, 1977. He returned to his job a week later, and again ceased working in early September, 1977. He filed a claim for temporary total disability under the Act, alleging that his employment had aggravated the pre-existing psoriasis, and was thus compensable.

There was no dispute as to Mr. Hensley's claim that his physical condition precluded him from performing his duties as a bus driver. The dispute which arose involved the question of fact as to whether his psoriasis had been aggravated or exacerbated by his occupation, thus the case was set for trial before an Administrative Law Judge of the Department of Labor.

Following a full evidentiary hearing, the Administrative Law Judge assessed the demeanor of the witnesses, analyzed the reasoning given in support of the differing opinions testified to by the expert medical witnesses, and found that Mr. Hensley's condition was unrelated to his occupation, thus noncompensable under the Act. The presumption of compensability under section 20 of the Act was considered, but was found to be inapplicable because substantial evidence to the contrary had been introduced at the hearing.[1] The evidence considered included three expert opinions representing three divergent views: (1) his treating dermatologist, who opined that the psoriasis was aggravated by his occupational duties;[2] (2) a consulting physician, who submitted a report opining that the claimant's work "could result" in a flaring of the condition;[3] and (3) a nationally prominent dermatologist of many years' expertise, who disagreed with the other doctors, testifying that in his opinion Mr. Hensley's condition was not related to his occupation.[4]

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[1] Appendix C, p. 64a

[2] Appendix C, p. 70a

[3] App. C, p. 84a-85a

[4] The latter opinion, accepted by the Administrative Law Judge was based upon the expert's review of Mr. Hensley's medical history, a physical examination of the claimant, photographs, his medical records and reports, as well as the expert's review of

The case then proceeded on appeal to the Benefits Review Board of the United States Department of Labor which held by majority decision, that the record, considered as a whole, contained substantial evidence to support the findings and decision of the Administrative Law Judge, and affirmed his decision (Appendix B, pp. 47a-60a).

Mr. Hensley petitioned for review to the United States Court of Appeals for the District of Columbia Circuit pursuant to 33 U.S.C. §921(c). The Circuit Court, in its divided decision, re-weighed the medical evidence and reversed the administrative determination, entering judgment for the claimant. In essence, the majority decision below held that the expert medical opinion of the nationally prominent dermatologist did not constitute "substantial evidence" so as to overcome the statutory presumption. The Circuit Court further stated that even if the presumption were ignored, the Administrative Law Judge was nevertheless required to find that the weight of the evidence was in claimant's favor by reason of the testimony of the treating physician (Appendix A., p. 25a, n. 13.)

REASONS FOR GRANTING THE WRIT

I

The Decision Below Decided A Federal Question In Conflict With Applicable Decisions Of This Court

The majority decision below conflicts directly with this Court's decisions on the "substantial evidence" rule applicable to the Circuits in reviewing administrative fin-

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medical treatises on the subject. There was no objection to his qualifications, his opinion, or to the facts constituting the basis therefor. App. D, p.72a-83a

dings of fact under the federal Longshoremen's and Harbor Workers' Compensation Act,[5] as well as the Administrative Procedure Act.[6] The decision departed from the parameters established by this Court on virtually every phase and underlying consideration of the "substantial evidence" rule when it reversed an administrative finding of fact made after a full evidentiary hearing, which took into account the demeanor of the witnesses, and was based upon a detailed analysis of the reasoning given in support of the disparate expert opinions submitted into the record.

The decisions of this Court have placed a definite limitation upon the scope of judicial review of factual determinations under both the Longshoremen's and the Administrative Procedure Acts, precluding the reviewing courts from doing precisely that which was done by the majority decision below, *i.e.*, re-weighing the conflicting evidence and deciding the case on the basis of what that Court deemed to be the weight of the evidence, thereby substituting its judgment for the findings made by the Administrative Law Judge.[7] Such substitution of judgment by the Court is even more questionable when, as

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[5] 33 U.S.C. §901, *et seq.*

[6] The 1972 Amendments to the Longshoremen's Act provide that hearings thereunder are subject to the Administrative Procedure Act, 5 U.S.C. §554. *See* 33 U.S.C. §919(d).

[7] The finding of no relationship or causation between Mr. Hensley's employment and the aggravation of his psoriasis was based primarily upon the expert medical opinion of Dr. Robert Stolar (whose qualifications and nationwide reputation as a consulting dermatologist were neither questioned nor challenged [App. D, p. 73a]). He testified without objection that there was no causal connection between the condition he found and the claimant's employment (App. D, p.75a-76a,83a), thus disagreeing with the opinions of the other physicians (App. D, p.76a,80a).

here, the administrative finding was affirmed by the Benefits Review Board on the basis that it was supported by substantial evidence in the record considered as a whole.[8]

While Section 20 of the Longshoremen's Act contains a presumption of compensability "in the absence of substantial evidence to the contrary", this Court has made it abundantly clear that the presumption controls only when there is an entire lack of competent evidence, but in cases like the one here where there is evidence both pro and con, the presumption disappears from the case and the administrative factfinder ". . . is alone empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court." *Del Vecchio* v. *Bowers,* 296 U.S. 280, 286-287 (1935).

The decision below, while paying lip service to *Del Vecchio, supra,* departed completely from this Court's long-established standard as to what constitutes "substantial evidence"[9], as well as this Court's holdings that a qualified expert's opinion, in and of itself, is suf-

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[8] The statute provides that ". . . The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. §921(b) (3). The Act and the regulations applicable to the hearing provide that the Administrative Law Judge shall not be bound by common-law or statutory rules of evidence, except as provided in 5 U.S.C. §554. *See* 33 U.S.C. §919(d), §923 and 20 C.F.R. §702.339.

[9] That is, ". . . such relevant evidence which a reasonable mind might accept as adequate to support a conclusion"; or ". . . enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

ficient to constitute "substantial evidence" so as to preclude reversal of factual findings based thereon, under either the Longshoremen's Act or the Administrative Procedure Act. See *Banks* v. *Chicago Grain Trimmers Association,* 390 U.S. 495, 497 (1968); *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 619-620 (1966); and *Federal Power Commission* v. *Florida Power & Light Co.,* 404 U.S. 453, 464-467 (1972).[10]

A reading of the majority decision below discloses not only that it departed from the prior decisions of this Court, but that it did so on the very basis criticized by the Court in *Consolo* v. *Federal Maritime Commission, supra.* In justifying its holding that there was no substantial evidence contrary to the opinion of the claimant's doctor, the decision below re-weighed the evidence on a selective basis, (e.g., referring only to an earlier report of Dr. Stolar and completely omitting any reference to his expert testimony given at trial that Mr. Hensley's condition was not related to the claimant's employment). Moreover, the majority decision below makes it clear that the Circuit Court was second-guessing the factfinder as to the weight of the evidence (*e.g.*, ". . . the Administrative Law Judge badly misunderstood the import of the treating physician's testimony. . ." [App. A, p. 23a], and ". . . there is little doubt in our minds that even if the Administrative Law Judge had entirely ignored the statutory presumption he

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[10] *In Federal Power Commission*, this Court discussed the several hundred year history of expert opinion testimony, its role, and function in the adjudicative process. Long before that case, this Court held that an expert's opinion was a sufficient basis to support an administrative decision even when based on hearsay, where there was no objection either to the expert's qualifications or to the introduction of the hearsay upon which the opinion was based. See *Spiller* v. *A.T. & S.F. Ry. Co.*, 253 U.S. 117, 130-131 (1920).

would still have to find that the weight of the evidence was in Hensley's favor, since the testimony of two treating physicians is normally entitled to greater weight than the testimony of one physician who examines the claimant only once many months later.").[11] The Court below then went on to formulate its own medical judgment based largely upon medico-legal texts which were not in evidence, and about which none of the medical experts testified. (See references to P. Cantor, *Traumatic Medicine and Surgery for the Attorney,* [1962] Appendix A, at pp. 8, 19).

In rejecting this very approach toward appellate review of administrative findings based on expert opinion, this Court held in *Consolo, supra,* (383 U.S., at 618-620):

> "In effect, the standard of review applied and articulated by the Court of Appeals in this case was that if 'substantial evidence' supports a conclusion

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[11] App. A, p. 25a at n.13. This statement, based upon a 1967 Social Security Act case, is contrary to the prevailing rule that an expert's testimony is never binding upon a trier of fact (see Section II below, at p. 10). Carried to its logical conclusion, it would deprive the Commission of its ability to procure its own experts to render an opinion which would later be entitled to any weight in a Court review, although Congress specifically authorized the Commisssion to obtain such later independent physical examinations and opinions. *See* 33 U.S.C. §907(e) and 20 C.F.R. §702.408, *et seq.* Moreover, *Richardson* v. *Perales*, 402 U.S. 389 (1971), involving the Social Security Act, makes it clear that a mere medical report, unaccompanied by testimony, is nevertheless sufficient to constitute substantial evidence, when no effort was made to subpoena the witness. Even the dissent in that case indicates no quarrel with a finding based upon sworn testimony such as that involved here, where the administrative proceedings have let " . . . trial by ordeal of cross-examination distill the truth." (402 U.S., at 414).

contrary to that reached by the Commission, then the Commission must be reversed. This standard is not consistent with that provided by the Administrative Procedure Act."

* * *

". . . This [substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence [citing]"

* * *

"Congress was very deliberate in adopting this standard of review. It frees the reviewing courts from the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal, and it helps promote the uniform application of the statute. . . . These policies would be damaged by the standard of review articulated by the court below."

Whether considered under the Longshoremen's Act or the Administrative Procedure Act, the approach utilized below in reversing the administrative finding of fact far exceeded the narrow bounds afforded by the substantial evidence rule. The re-weighing of expert medical testimony adduced before an administrative tribunal by the majority below involves an important federal question and sets a precedent which conflicts with applicable decisions of this Court so as to call for review thereof.

II

The Decision Below Is In Conflict With The Holdings Of Other Federal Circuits

The decision below, whether it be viewed as holding only that a medical expert's opinion does not constitute substantial evidence, or whether it be viewed as holding that one expert opinion, rather than another, is binding upon the trier of fact, is directly in conflict with the holdings of the other Circuits, whether viewed under general principles pertaining to expert testimony, or viewed under the Longshoremen's Act or the Administrative Procedure Act.

As was stated in *Mims* v. *United States,* 375 F.2d 135, 140 (5th Cir., 1967):

> ". . . [O]ne of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of *credibility* and *weight* of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted." (Emphasis in original)

Other Circuits have likewise recognized this rule. See, *e.g., Boston Ins. Co.* v. *Read,* 166 F.2d 551, at 553 (10th Cir., 1948); *Dusky* v. *United States,* 295 F.2d 743, 754 (8th Cir., 1961); and *Feguer* v. *United States,* 302 F.2d 214, 242 (8th Cir., 1962).

As to the Longshoremen's Act,[12] the decision below is in direct conflict with the Third Circuit's decision in

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[12] The desirability of uniform interpretation is enhanced by the considerations involved under the Longshoremen's Act.

* * *

"An Act designed to provide equal justice to every longshoreman similarly situtated". *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 735 (1967).

Walker v. *Universal Terminal & Stevedoring Corp.*,_____ F.2d _____, 13 BRBS 257 (No. 80-2142, decided April 10, 1981), a copy of which is reproduced in Appendix E. In *Walker*, the Administrative Law Judge ruled in favor of the employer, finding that the decedent's death was not compensable on basis of medical expert opinion presented by the employer. The Benefits Review Board reversed, holding the Administrative Law Judge's decision was not supported by substantial evidence. After noting the disagreement between the conflicting opinions of the experts, the Third Circuit held (App. E., p. 111a-112a):

> "We hold further that, with the presumption out of the case, the Administrative Law Judge was amply supported by substantial evidence in the record as a whole for his conclusion that intoxication was the sole cause of Walker's death. Again the testimony of Dr. Halpern directly supports that conclusion. . . . The Administrative Law Judge was thus forced to make a choice based upon the credibility of the two doctors. Had the Administrative Law Judge decided to accept the version of Dr. Santo we could not say there was not substantial evidence in support of that theory [citing]. . . But the Administrative Law Judge did not accept his testimony. . ."

To the same effect are Longshoremen's Act holdings of the Ninth Circuit in *Bumble Bee Seafoods* v. *Director, Office of Workers' Compensation Programs,* 629 F.2d 1327, 1330 (1980), as well as the Fifth Circuit's decision in *Todd Shipyards Corp.* v. *Donovan,* 300 F.2d 741, 742 (1962). The former holds that the administrative decision as to plaintiff's employability was supported by substantial evidence where based on one of several con-

flicting medical opinions, and the latter adheres to the principle that an administrative determination based upon medical opinion is not subject to reversal, even though such finding may have been contrary to the weight of the medical testimony.

The majority decision below is also in conflict with decisions of other Circuits in cases under the Adminstrative Procedure Act, as exemplified by the Third Circuit's decision in *Corn Products Co.* v. *Department of Health, Education and Welfare,* 427 F.2d 511, 515 (1970), and the Seventh Circuit's decision in *Erikson* v. *Federal Trade Commission,* 272 F.2d 318, 321 (1959), (both holding that expert testimony is alone sufficient to constitute "substantial evidence" under the Administrative Procedure Act), as well as the oft-cited statement of Judge Parker contained in the Fourth Circuit's decision in *United States ex rel Chapman* v. *Federal Power Commission,* 191 F.2d 796, 808 (1951):[13]

> "The [substantial evidence] rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusion of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters of hydraulic engineering. It is in just such matters that the findings of the Commission because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission."

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[13] *Affirmed,* 345 U.S. 153 (1953). Later quoted with approval by this Court in *Federal Power Commission* v. *Florida Power & Light Company, supra,* at p.466.

Accordingly, it is submitted that the divided decision below is in conflict with the decisions of other Circuits on the same matter, and has so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

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